No. 2365

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

OLAF LIE, Master of the Norwegian Steamship "Selja", on behalf of himself and the owners, officers and crew of said steamship,

Appellant,

vs.

SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY, Claimant of the American Steamship "Beaver",

Appellee.

APPELLANT'S REPLY TO APPELLEE'S "MEMORANDUM" ARGUMENT ON THE "POMARON" CASE.

E. B. McCLANAHAN,
S. H. DERBY,
Proctors for Appellant.

Filed this.....day of August, 1914.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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In answering the argument based on the Pomaron-Alleghany decision of the Circuit Court of Appeals for the Second Circuit, we are constrained first to revert to statements made therein which are not warranted by any of the facts of the case. For the evident purpose of attracting the court's serious and favorable attention the argument commences with the statement

that the facts *"are so analogous to the case at bar"* that the case should receive the court's attention in any opinion to be rendered (Memo. pp. 1-2). A most cursory reading of the opinions of both courts in the "Pomaron" case refutes this statement of analogy, and shows on the contrary that in the circumstances of the two cases there is not to be found a single material point of similarity.

As showing the superficial character of counsel's consideration of this case we call attention to the fact that the suit was not brought by one colliding vessel against another, as intimated by counsel (Memo. p. 2), but was initiated by the cargo owners of the "Alleghany" against the owners of *both* vessels. As, however, the Hamburg-American Co., owner of the "Alleghany", petitioned for limitation of liability and surrendered the vessel's pending freight *"the libels were thereupon stayed as to that company"* (Memo. p. 10), and the record shows that neither the "Alleghany" or her owners were represented by counsel. Furthermore, on this same subject, there was no insistence on the part of the owners of the "Alleghany" for a division of damages, as stated by counsel (Memo. p. 2), nor do we find in the record any admission of liability on the part of that vessel,—in fact, because of the limitation of liability referred to, the *full loss* was assessed against the "Pomaron".

Again, in seeming justification of the statement that *"the fault of the Pomaron was of relatively minor importance"* (Memo. p. 2), thus pointing to an analogy with the "Selja's" minor fault, counsel says that it

was committed in broad daylight when the vessels were a mile apart and between five and seven minutes before the collision. The appellate court, however, on this subject of relative fault says that under the circumstances of a collision between *steamers* on the *high seas, unembarrassed by the presence of other vessels, in broad daylight and clear weather* where they are in *plain sight of each other when miles apart, "plain common sense"* constrains one to the conclusion that it would be difficult to account for the collision unless both vessels were in fault in failing to exercise reasonable care, and that to exonerate either under such circumstances could be justified only if upon the closest scrutiny of the navigation of each vessel it could be shown that one of them was free from culpable blame (Memo. p. 19). "We have examined the evidence in the case with care and we have not been satisfied that either of these vessels was free from fault" (Id.). Indeed, it would appear that to the appellate court the fact that the collision took place in broad daylight in clear weather when the vessels *"were in plain sight of each other when miles apart"* was the *compelling reason* for its refusal to relieve the "Pomaron" from the burden of a rule (the rule of the "Pennsylvania" case) characterized by the lower court as *"mechanical and arbitrary"* (Memo. p. 40).

Counsel's opening and emphasized statement, therefore, that the facts of the "Pomaron" case are analogous to those of the case at bar is disclosed as a pretty illustration of the adage that the wish is father to the thought.

Passing now to the announced law of the case, we can discuss it briefly for the reason that *in no material aspect does it differ from that of other cases hereinbefore fully cited and commented on.* The court finds that at the time of the collision the "Pomaron" was in the active present violation of Article 21 requiring a privileged or holding on vessel to keep her course. It also finds that the vessel's excuse for being in this situation was not well taken because, when the act was done which led to the predicament in which the "Pomaron" found herself at the time of the collision, there was then no "*immediate danger*" warranting a departure from the duty imposed by the rule on a privileged vessel. It being established, therefore, that, without justifiable excuse, the "Pomaron" was on a changed course at the time of the collision, it necessarily followed that the rule as to the burden of proof laid down in the case of the "Pennsylvania" became applicable.

Assuming the correctness of counsel's statement (Memo. p. 7) that the brief for the "Pomaron" invoked the decision in the "St. Louis" case against the application of this burden of proof rule, it becomes evident, as the "Pomaron" and "St. Louis" cases were decided *by the same court,* that if the contention as to the facts made in the latter case coincides with the clearly proven facts of the case at bar, then there should be found in the "Pomaron" case something that distinguishes it. In the "St. Louis" case it is announced, that on the authority of the Supreme Court in the "Umbria" case, the trial court would unquestionably have been right in exonerating the "St. Louis" if its finding as to the

speed of the "Delaware" and the backward movement of the "St. Louis" at the moment of impact was correct. But such finding was not correct and, therefore, the case was one

> *"for the application of the rule in collisions that whenever it appears that one of the vessels has neglected the usual and proper means of precaution the burden is upon her to show that the collision was not owing to her neglect".*

In the case at bar both of these controlling facts of the "St. Louis" case are proven and admitted,—the immoderate speed of the "Beaver" as well as the backward movement of the "Selja".

In the "Pomaron" case the court applied the burden of proof rule because it found that the circumstances made it applicable. It found further that when the "Pomaron" first ported *"the circumstances had not developed which justified any departure from the established rules",* and that, therefore, the *"immediate danger"* referred to in Article 27 had not yet become apparent. It was not, therefore, the immediate, unjustifiable act of porting, some five or seven minutes before the collision, that alone brought the "Pomaron" within the burden of proof rule, but the additional fact that the resulting altered course of the vessel existed *"at the time of the collision".*

Although, in determining whether the "Pomaron" had met the burden thus thrown upon her, because of her predicament at the time of the collision, the court attempts to work out and apply a test which is said in the "Umbria" case to be *manifestly improper,* still

we submit, that as bearing on the case at bar, this attempt becomes immaterial when it appears that an evidently controlling reason for holding the "Pomaron" liable is found in the special circumstances of a *"clear weather"* collision where the vessels *"were in plain sight of each other when miles apart"*.

Why the court should in the "St. Louis" case expressly approve of the test of contribution laid down in the "Umbria" case, and in the "Pomaron" case apparently resort to the contrary *speed ratio* test of the English case of the "Brittania", we are unable positively to explain, unless because of the dissimilarity in the facts (as was the court's excuse in the "Admiral Schley" case), or the explanation may be found in the suggestion that the court was simply analyzing the "Pomaron's" only proof of non-contribution and was unheedful of the exact propriety of the test it applied. However this may be, the fact remains that if the evidence in the "St. Louis" case had established, as it was intended to do, exactly analogous ~~faults~~ facts to those of the case at bar, the court would have exonerated the "St. Louis".

As we have previously said, the burden of proof rule of the "Pennsylvania" case is limited by its express terms to violations existing *"at the time of the collision"*. Counsel, in the present argument, still persists in *misconstruing* (see appellee's main brief, p. 75, and appellee's reply brief, p. 2) our contention as to the meaning of this phrase (Memo. p. 6), and we refrain from again stating it for manifestly the court will not be misled by counsel's inability, or reiterated refusal,

to understand us (see our main brief, p. 121, and our reply brief, pp. 6-7).

In conclusion and to summarize, we submit that the opinion in the case of the "Pomaron", which, at the request of counsel, was intended to halt the opinion of this court, so clearly discloses facts radically different from the facts of the case at bar that it cannot possibly affect the decision of this court; that certain of these facts, in the opinion of the court, made the collision so inexcusable that *"plain common sense"* constrains one to the conclusion that both vessels failed to exercise reasonable care; that certain other facts clearly established the applicability of the rule of the "Pennsylvania" case; that the seeming adoption of the speed ratio test on the question of contributory negligence can in no respect affect the decision of the case at bar for the reason that here the "Pennsylvania" rule does not apply; moreover, should it be held to apply, the refusal of our Supreme Court to follow the speed ratio test is controlling on the question of contribution, and that on that question the law is established beyond dispute that the only proper test lies in the determination of whether a vessel's speed in a fog can be stopped before her arrival at the point where the courses of the two vessels intersect. The court will remember that in speaking of the speed ratio test in the "Umbria" case the court says: *"Manifestly this is not the proper test."* Furthermore, in the "Belgian King" case, the court says:

> *"The rule is that a vessel in a dense fog is bound to observe unusual caution and to maintain only*

such a rate of speed as would enable her to come to a standstill by reversing her engines at full speed before she could collide with a vessel which she could see through the fog.''

This is what the careful navigation of the ''Selja'' enabled her to do, and we submit that what happened before, if it in no wise hindered or embarrassed the ''Beaver's'' movements, becomes immaterial on the question of contributory negligence.

Counsel's newly suggested point, that if the ''Selja'' had been longer delayed in reaching the intersection of the courses, the ''Beaver'' might have heard more of her whistles, is far from convincing. We suggest that her great speed was an effective and continuing cohibition on her ability to hear the ''Selja's'' whistles, and that her fixed purpose to make speed in a fog overrode and controlled all other considerations. She had heard whistles, and many of them, blown from vessels other than the ''Selja'' without being affected in her conduct in the slightest. The inference, therefore, is strong that even though it had been possible for her to have heard more of the ''Selja's'' whistles her speed would have remained undiminished, and her course unaffected.

Dated, San Francisco,
August 12, 1914.

Respectfully submitted,

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